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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LEONARD JOHNSON,

Defendant and Appellant.

D068437

(Super. Ct. Nos.  
SCD237392, SCD233933)

APPEAL from a judgment of the Superior Court of San Diego County, Frederick Maguire, Judge. Affirmed in part, reversed in part and remanded with directions.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Julie L Garland, Assistant Attorneys General, Lynne G. McGinnis and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted David Leonard Johnson in case No. SCD237392 of first degree robbery (Pen. Code,<sup>1</sup> §§ 211, 212.5, subd. (a); count 1), first degree burglary (§§ 459, 460; count 2), assault with a deadly weapon by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 3) and felony false imprisonment (§§ 236, 237; count 5).<sup>2</sup> It found true as to all counts that Johnson personally used a knife within the meaning of section 12022, subdivision (b)(1), and counsel stipulated to an on-bail enhancement pursuant to section 12022.1, subdivision (b). The trial court found true allegations that Johnson suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) as well as two serious felony prior convictions (§ 667, subd. (a)), and served four prior prison terms (§ 667.5, subd. (b)). It sentenced Johnson to 17 years plus 25 years to life in prison, consisting of a 25-year-to-life sentence on count 1, 10 years for the two serious felony prior convictions, four years for the prior prison terms, one year for the knife-use enhancement, and two years for the on-bail enhancement. The court stayed the sentences on counts 2, 3 and 5 under section 654. The court imposed a two-year term in case No. SCD233933, concurrent to his sentence in case No. SCD237392.

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> This appeal arises from retrial of these counts against Johnson after this court reversed his convictions in a nonpublished opinion, *People v. Johnson* (Mar. 25, 2014, D063149). We affirmed the judgment but vacated Johnson's sentence in a second case, No. SCD233933, in which Johnson was convicted of evading an officer by reckless driving (Veh. Code, § 2800.2, subd. (a); count 1), two counts of driving under the influence (Veh. Code, § 23152, subds. (a), (b); counts 2 & 3), and the jury found true an allegation that Johnson had a blood alcohol level of .15 percent or more while driving (Veh. Code, § 23578) with respect to counts 2 and 3. The trial court in that case found true the same prior convictions alleged in this case. (*People v. Johnson*, D063149 at p. 2.)

Johnson contends the trial court prejudicially erred by failing to instruct the jury on receiving stolen property as a lesser included offense to robbery. He further contends this court should reverse his sentence and remand for a new trial on his prior 1995 and 2002 assault convictions because the People did not present sufficient evidence to support the findings that they were strike and serious felony convictions under California law. He additionally contends the trial court erred by imposing two of the one-year terms for his prison priors because they were based on the same crimes for which the court imposed a five-year serious felony conviction enhancement. Finally, Johnson asks that the abstract of judgment be amended in case No. SCD237392 to reflect that he was not found to have eight serious felony prior convictions. The People concede the latter point. With respect to Johnson's prison conviction priors, they argue we should order a limited remand for the court to both amend the abstract of judgment and also determine whether one of the convictions, case No. TA065809, is a qualifying prior prison conviction, as well as clarify its sentencing choices with respect to the prior conviction enhancements.

We decline to accept the People's concession as to Johnson's abstract of judgment, because the abstract properly reflects that the trial court imposed two five-year serious felony enhancements on each of Johnson's indeterminate terms on counts 1, 2, 3 and 5. We agree that remand is appropriate for the court to clarify whether Johnson's March 16, 1995 conviction for possession of a controlled substance qualifies as a prison prior under section 667.5, subdivision (b) and state the basis for its finding. In all other respects, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

For a few days in September 2011, Lindsey Gardini shared her hotel room with Johnson and his young female companion Samantha. Gardini kept her belongings in the room including her birth certificate, social security card, identification, college transcripts, a borrowed laptop computer, and her phone. She later left that hotel and found her own room at a Days Inn, but Johnson and Samantha located her. Gardini, who was ready to find her own place to live but wanted to help Johnson and Samantha, eventually loaned Johnson money for drugs, but ended up in a dispute over their arrangement and the nature or quality of what Johnson had given her. Gardini also suspected that they had taken the key to her room safe where she kept her valuables.

About 10:00 p.m. the next night, Johnson and Samantha showed up at Gardini's third-floor room, where Johnson refused to give Gardini her money back, choked her, forced a knife into her throat, and threatened to inject her with a drug and leave her to die, while Samantha went through Gardini's possessions. At one point, Gardini was able to open the door and scream, but she was pulled back into the room. Johnson and Samantha hog tied Gardini and left her gagged and under a blanket. Gardini was able to free herself and ran out of the room onto the balcony, where she saw Johnson still standing in the parking lot below. She yelled out his name, then escaped to another room.

Shortly after 10:30 that evening, Days Inn manager Jeffrey Lieras was outside and heard a female scream. Less than a minute later, he saw an approximately six-foot African-American male with "crazy hair" that the manager associated with "dreadlocks and frizzy hair." According to Lieras, the man was very wild-eyed and hastily coming down the stairs alone, looking for a way to leave. Within five minutes, Lieras received a

call from the guests in the neighboring room. He talked to Gardini, who told him the man who assaulted her was staying at a Rodeway Inn. Lieras described the man to police because he thought he was connected to the incident. A police officer responding to the incident sent out a broadcast of a suspicious vehicle, which was described to him as a Range Rover that had left the hotel parking lot shortly after the incident with a female driver and male passenger. Lieras told the officer that an approximately six-foot man with frizzy hair ran by him while he was out in front of the hotel. Lieras described the man as having frizzy hair, not dreadlocks.<sup>3</sup>

At 10:48 p.m., a cab company was dispatched to a Rodeway Inn about a block away from the Days Inn, where the driver picked up Johnson and Samantha and drove them to a motel in National City. The couple had black luggage with them.

Four days later, police investigating the matter later located Johnson at a Chula Vista hotel room, where they found a folder containing Gardini's personal items including her birth certificate, driver's license, social security card and other paperwork, as well as a laptop computer and a phone that matched Gardini's descriptions.

## DISCUSSION

### I. *Claim of Instructional Error*

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<sup>3</sup> Prison records indicate Johnson is five foot seven or five foot eight inches tall. Gardini testified that at the time of the incident Johnson had short hair and not dreadlocks or an afro.

During a jury instruction conference, the trial court rejected defense counsel's request to instruct the jury with receiving stolen property (§ 496, subd. (a)) as a lesser included offense to robbery. The court reasoned that though there was evidence of receiving stolen property as a lesser related offense, the uncharged crime was not a lesser included offense.

Johnson contends the trial court erred by not instructing on receiving stolen property as a lesser included offense to robbery. He points out that in 1992, the Legislature amended section 496 to read in part: "A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property." (§ 496, subd. (a).) Johnson argues that this amendment means a thief may be convicted of receiving the property he stole, as long as he is not also convicted of theft under section 496.<sup>4</sup> According to Johnson, properly harmonizing the statutory elements test with the current version of section 496 should compel us to conclude that receiving stolen property is in fact a lesser included offense to robbery. He reasons that under the statutory elements test, "one cannot forcibly take possession of another person's property in a robbery without taking possession of that property with knowledge it is stolen" and

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<sup>4</sup> In *People v. Allen* (1999) 21 Cal.4th 846, the court explained that "[a]fter the 1992 amendment, 'the fact that the defendant stole the property no longer bars a conviction for receiving, concealing or withholding the same property.'" (*Allen*, at p. 857.) Thus, section 492 prohibits dual *convictions* of both receiving stolen property and the offense of stealing the same property. *Allen* actually held that a defendant *could* be convicted of both burglary and possession of stolen property with respect to property he or she stole in the burglary. (*Id.* at pp. 865-867.)

consequently the section 496, subdivision (a) offense is necessarily included in robbery. Johnson distinguishes cases involving the offense of receiving stolen property before section 492's 1992 amendment on grounds they are based on an interpretation of the crime as precluding a receiving stolen property conviction of a principal in the actual theft. He maintains the error was prejudicial as the evidence of his identity as the person who committed the robbery was subject to reasonable doubt, but not the evidence he was in possession of Gardini's stolen property, and one or more jurors could have opted for a verdict on the lesser charge had they been given that option.

#### A. *Legal Principles*

"A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citation.] This sua sponte obligation extends to lesser included offenses if the evidence 'raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.] [Citations.] . . . 'A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] "there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser.*' " (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.) However, "the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons]

could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed."

(*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Our courts have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the "elements" test and the "accusatory pleading" test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Stated another way, " ' " '[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " ' [Citation.] Nevertheless, if the *same* evidence is required to support *all* elements of both offenses, there is no lesser included offense. [Citation.] Each is its own offense, based on different statutes that apply to the same conduct; neither can be said to be a lesser of the other." (*People v. Robinson* (2016) 63 Cal.4th 200, 207, fn. omitted.)<sup>5</sup>

Section 496 provides in part: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of

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<sup>5</sup> The People did not charge Johnson with receiving stolen property, and so there is no basis to apply the accusatory pleading test. " 'Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.' " (*People v. O'Malley* (2016) 62 Cal.4th 944, 984.)

Section 1170." (§ 496, subd. (a).) To sustain a conviction for receiving stolen property, the People must prove "(1) the property was stolen; (2) the defendant knew it was stolen; and (3) the defendant had possession of it." (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728; see also *People v. Land* (1994) 30 Cal.App.4th 220, 223.)<sup>6</sup> Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (See also *People v. Jackson* (2016) 1 Cal.5th 269, 343 ["Robbery is 'the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property' "]; *People v. Clark* (2011) 52 Cal.4th 856, 943; see also CALCRIM No. 1600.)<sup>7</sup>

## B. Analysis

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<sup>6</sup> The CALCRIM instruction provides in part: To prove that the defendant is guilty of [receiving stolen property], the People must prove that: [¶] 1. The defendant (bought/received/sold/aided in selling/concealed or withheld from its owner/aided in concealing or withholding from its owner) property that had been (stolen/obtained by extortion); [¶] [AND] [¶] 2. When the defendant (bought/received/sold/aided in selling/concealed or withheld/aided in concealing or withholding) the property, (he/she) knew that the property had been (stolen/obtained by extortion).) (CALCRIM No. 1750.)

<sup>7</sup> The CALCRIM jury instruction on robbery describes the elements as "1. The defendant took property that was not (his/her) own; [¶] 2. The property was in the possession of another person; [¶] 3. The property was taken from the other person or (his/her) immediate presence; [¶] 4. The property was taken against that person's will; [¶] 5. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND [¶] 6. When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property)." (CALCRIM No. 1600.)

We reject Johnson's claim that one cannot commit robbery without also necessarily committing the crime of receiving stolen property. The People correctly assert that receiving stolen property does not require proof that the defendant took the property, and argue from this point that the receiving offense is not a lesser included offense to robbery. They argue that the 1992 amendment to section 492 only prohibits dual convictions, and does not change the elements of the offenses. They maintain that receiving stolen property is at most a lesser related offense to robbery, on which Johnson has no right to an instruction unless the prosecution agreed to it. (See *People v. Jennings* (2010) 50 Cal.4th 616, 668; *People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.) A lesser related offense " 'merely bear[s] some relationship' " to another offense. (*People v. Robinson, supra*, 63 Cal.4th at p. 207, fn. 3.) Unless the prosecution agrees to instruction on a lesser related offense, a defendant has no right to compel presentation of this lesser verdict option to the jury. (*People v. Valentine*, at p. 1387.)

Courts hold it is settled or "well-established" that receiving stolen property is not a necessarily included offense to robbery or larceny. (*People v. Spicer* (2015) 235 Cal.App.4th 1359, 1372, citing *People v. Mora* (1956) 139 Cal.App.2d 266, 274; *In re Christopher S.* (1985) 174 Cal.App.3d 620, 624.) In *People v. Mora*, the court reasoned that "[t]he elements of the two offenses are different." (*People v. Mora*, at p. 274.) *Mora* relied on cases holding that receipt of stolen property was not included in the offenses of burglary or grand theft. (*Ibid.*) In *Christopher S.*, the court reasoned that larceny and receiving stolen property are distinct because "the crime of receiving stolen property is

aimed at the 'fence,' not the thief" and "[t]hus, '[t]he actual thief cannot receive from himself the fruits of his larceny.' " (*Christopher S.*, at p. 624.)

We agree that because it is permissible to convict a principal in a theft of receiving the property he or she took (as long as that person is not *also* convicted of the theft), the latter statement of *Christopher S.*, is no longer sound. But this observation does not resolve the question of whether the statutory elements test is met for purposes of robbery and receiving stolen property, and we conclude the Legislature's 1992 amendments to section 496 do not change the basic proposition that an act of receiving stolen property is distinct from robbery for purposes of instructing the jury on the two offenses. Robbery is at root a crime involving the taking of personal property (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 535); it is essentially larceny aggravated by the circumstances of use of force or fear to accomplish the taking of property from a person or in that person's presence. (*People v. Gomez* (2008) 43 Cal.4th 249, 254, fn.2; *In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007-1008.) Receiving stolen property is not the act of stealing or felonious taking, but the act of buying, receiving, retaining or disposing of property with knowledge that it has been stolen.

We hold in any event there was insufficient evidence to require a sua sponte instruction on receiving stolen property. As the People point out, it was undisputed Gardini screamed twice, the first time while Johnson and Samantha were still in the room and the second time when Johnson was in the parking lot below. It would be an extremely weak inference to conclude that Johnson received Gardini's stolen property from some other person, or that the man Lieras saw running down the stairs just after

Gardini screamed was in fact the perpetrator of the robbery, as opposed to Johnson himself or an unrelated person reacting to the incident. Lieras saw nothing indicating the man was carrying any property or luggage. And minutes after the incident, Johnson and Samantha, bearing luggage, were taken by taxi from their hotel a block away from the Days Inn to another location. Any inference from Lieras's testimony that someone other than Johnson was Gardini's actual robber is not substantial enough to merit the jury's consideration in view of the evidence of Johnson's guilt.

For similar reasons, even if we were to conclude the court erred by failing to instruct the jury regarding the lesser included offense of theft, we would find the error harmless under any standard. The evidence that Johnson robbed Gardini by applying force and fear while Samantha removed various items of property from Gardini's room was unchallenged and extremely strong, including photographs of Gardini with her injuries and the condition of her hotel room. Other than Lieras's testimony, Johnson points to no evidence to the contrary. Under the circumstances, it is not reasonably probable (*People v. Watson* (1956) 46 Cal.2d 818, 836–837, 299) that the jury would have concluded Johnson was guilty of receiving stolen property but not also guilty of the robbery, and indeed, any error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

## II. *Sufficiency of the Evidence of Serious Felony and Strike Prior Convictions*

Following the jury's verdict in the matter, Johnson waived a jury and the court conducted a bench trial on the People's allegations that Johnson had suffered three prior

strike convictions and two serious felony prior convictions. In part, the People had alleged that Johnson was convicted in March 1995 of assault (§ 245, subd. (a)(1)) in case No. TA040857, and in December 2002 he was convicted of assault in case No. TA065809; both were alleged to be strikes and serious felonies.<sup>8</sup> The trial court found both convictions qualified as strikes and serious felonies.

Johnson contends the record was insufficient to conclude his prior assault convictions qualify as serious felonies and strike priors under California law. Specifically, he maintains that at the time of his prior offenses in 1995 and 2002, an assault under section 245, subdivision (a)(1) could be committed either with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury, but the latter type does not qualify as a strike or serious felony and the People did not establish either assault was committed with a deadly weapon. He asks this court to reverse his sentence and remand the matter for retrial on both of the prior assault convictions.

#### *A. Legal Principles*

To qualify as a strike under the "Three Strikes" law, a prior conviction must be a serious (§ 1192.7, subd. (c)) or violent (§ 667.5, subd. (c)) felony. (See *People v. Denard* (2015) 242 Cal.App.4th 1012, 1024; *People v. Banuelos* (2005) 130 Cal.App.4th 601,

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<sup>8</sup> Johnson was also convicted of robbery in case No. TA065809. He concedes that that robbery conviction qualifies as a strike and serious felony.

604 & fn. 3.) The prosecution must prove the serious or violent nature of the offense beyond a reasonable doubt, and may do so with court documents prepared contemporaneously with the conviction by a public officer charged with that duty, such as an abstract of judgment. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082; *People v. Delgado* (2008) 43 Cal.4th 1059, 1065-1066; see also *People v. Trujillo* (2006) 40 Cal.4th 165, 177, 180 [to determine the nature of a prior conviction, the trier of fact may look to the entire record of the prior criminal proceeding but no further].) The record of the prior conviction also includes transcripts of the preliminary hearing, the defendant's guilty plea, and the sentencing hearing. (*People v. Reed* (1996) 13 Cal.4th 217, 223; *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1101.) "[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred." (*Miles*, at p. 1083; *Delgado*, at p. 1066.)

"On the other hand, the trier of fact may draw *reasonable inferences* from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate. Unless rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction. [Citations.] [¶] On review, we examine the

record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Miles, supra*, 43 Cal.4th at p. 1083; *People v. Mai* (2013) 57 Cal.4th 986, 1038-1039 [court will presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence in evaluating the sufficiency of the evidence supporting the finding of a serious felony]; *People v. Delgado, supra*, 43 Cal.4th at pp. 1066, 1067.)

Relevant here, "[a]ssault with 'a dangerous or deadly weapon' is a California serious felony . . . but assault by force likely to produce great bodily injury is not." (*People v. Miles, supra*, 43 Cal.4th at p. 1083; *People v. Delgado, supra*, 43 Cal.4th at p. 1065; see also *People v. Fox* (2014) 224 Cal.App.4th 424, 434, fn. 8.)

B. *Case No. TA040857*

To prove the nature of Johnson's assault conviction in connection with case No. TA040857, the prosecutor introduced certified court records including the information, felony complaint, certified plea and sentencing transcript, court minutes, the abstract of judgment for case No. TA040857, and Johnson's later admission in another case (case No. TA051266) to the truth of an allegation that his assault conviction in case No. TA040857 was a strike conviction. The People also introduced a report indicating that Johnson's fingerprints matched the booking prints for the case.

The certified court records show the information in case No. TA040857 alleged that in December 1994, Johnson committed "assault great bodily injury *and* with deadly

weapon," which was further alleged to be a " 'serious felony within the meaning of . . . section 1192.7[, subdivision] (c)(23).' " (Italics added, some capitalization omitted.) The information further alleged that Johnson "did willfully and unlawfully commit an assault upon Robert Sheue with a deadly weapon, to wit, baseball bat, *and* by means of force likely to produce great bodily injury." (Italics added.) In April 1995, Johnson pleaded no contest to that charge, which the court described as "assault with a deadly weapon . . . ." During that plea hearing, the court advised Johnson that "either one of these offenses are so-called strikes under the current strike laws." The court said: "Then in case No. TA040857 charging you in count 1 of that information with assault with a deadly weapon, a violation of section 245[, subdivision (a)(1)] . . . , a felony, to that charge how do you want to plead today?" Johnson answered: "No contest." The parties thereafter stipulated that there was a factual basis for the plea. The abstract of judgment indicates that Johnson was convicted of "ASLT GRT BDLY INJ/WPN."

The records further contain a minute order showing that in December 2010, in connection with his guilty plea in a different case (case No. TA051266), Johnson admitted the truth of an allegation in the amended information that he had suffered a strike for his prior conviction in case No. TA040857.

Johnson argues this record shows only a "bare guilty plea" to assault, and that the record is otherwise silent as to the nature of his offense. Relying on *People v. Thoma*,

*supra*, 150 Cal.App.4th 1096 and *People v. Trujillo*, *supra*, 40 Cal.4th 165,<sup>9</sup> he argues that only admissions made before acceptance of his guilty plea may be relied on to determine whether his prior conviction qualifies as a strike, and admissions made after the plea's acceptance "do 'not reflect the facts upon which [he] was convicted.'" The People counter that there is sufficient evidence from Johnson's charging instrument, which specified an assault with a baseball bat and alleged it to be a strike, as well as from the minute order showing Johnson's later admission that the offense constituted a strike. In part, they argue Johnson's later admission obviated the need to prove the nature of the offense, and the fact it postdated his guilty plea in case No. TA040857 did not preclude the court's use of it, because using it " 'd[id] not require consideration of facts beyond those necessarily adjudicated in the prior proceedings.' "

We need not decide whether Johnson's admission in the second case can be considered part of the record of conviction, because it was sufficient that during the plea hearing the trial court characterized Johnson's count 1 offense as assault with a deadly

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<sup>9</sup> In *People v. Trujillo*, *supra*, 40 Cal.4th 165, the Supreme Court held that "a defendant's statements, made after a defendant's plea of guilty has been accepted, that appear in a probation officer's report prepared after the guilty plea has been accepted are not part of the record of the prior conviction." (*Id.* at p. 179.) According to the court, such statements do not reflect the facts of the offense for which the defendant was convicted. (*Ibid.*) *Thoma* held a trial court was precluded from relying on an alleged adoptive admission from defendant's silence in the face of court comments describing the victim's injuries in ordering restitution at a sentencing hearing. (*People v. Thoma*, *supra*, 150 Cal.App.4th at pp. 1100-1101.) The admission was made after the acceptance of the defendant's guilty plea, thus it could not reflect the facts on which the defendant was convicted and was not properly used in determining whether his prior conviction qualified as a strike. (*Id.* at p. 1102.)

weapon, advised him it was a strike, and shortly thereafter took Johnson's no contest plea to the offense. Additionally, the information alleged in the *conjunctive* that his assault offense was with a deadly weapon, and described the offense as assault involving use of a baseball bat, which was further alleged to constitute a strike. The information and plea document are part of the record of conviction. (*People v. Guerrero* (1988) 44 Cal.3d 343, 345, 356 [court properly considered accusatory pleading and the defendant's plea], disapproved on other grounds in *People v. Miles, supra*, 43 Cal.4th at p. 1093, fn. 14 [disapproving *Guerrero* to the extent it held it was sufficient evidence of a California serious felony for a defendant to plead guilty to a "violation of section 2113[, subdivision] (a)" without further description of the offense]; *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1450; *People v. Harrell* (1989) 207 Cal.App.3d 1439, 1444 [charging document and minute order reflecting plea is admissible if defendant pleaded guilty or no contest].) This was not a plea to the simple fact of violation of section 245, subdivision (a)(1), but a plea to an information that described the underlying facts of the offense in such a way that the court could infer it qualified as an assault with a deadly weapon, and a plea that occurred immediately after the court described the offense as an assault with a deadly weapon and a strike. (Accord, *People v. Sohal* (1997) 53 Cal.App.4th 911, 914 [affirming strike finding based on plea of guilty after prosecutor recited factual basis for plea showing personal use of a metal pipe; "Defendant entered a plea to 'assault with a deadly weapon' not assault 'by means of force likely to produce great bodily injury' nor simply 'assault as defined in section 245, subdivision (a)(1)' "]; *People v. Abarca, supra*, 233 Cal.App.3d at p. 1349-1351 [in determining whether a prior

conviction was "serious," a reporter's transcript of a plea hearing was admission over a hearsay objection when the transcript showed the defendant answered "yes" when asked by the court if he had pleaded guilty to a burglary of a residence].) Because a reasonable trier of fact could infer that Johnson used a deadly weapon, a baseball bat, in connection with the offense, it qualifies as serious felony within the meaning of section 1192.7, subdivision (c)(31).

*C. Case No. TA065809*

To prove the nature of Johnson's conviction in case No. TA065809, the prosecution introduced the felony complaint, verdict, preliminary hearing transcript, court minutes and the abstract of judgment. The People also introduced a transcript of a December 2002 hearing on Johnson's prior conviction allegations and sentencing in case No. TA065809, as well as the report indicating that Johnson's fingerprints matched the booking prints for the case.

The felony complaint alleges that in July 2002, Johnson committed the crime of "assault with deadly weapon, by means likely to produce GBI" and that Johnson "did willfully and unlawfully commit an assault upon Alejandro Morales with a deadly weapon, to wit, tire iron, automatic weapon, and automatic weapon, and by means of force likely to produce great bodily injury." (Some capitalization omitted.) The complaint further alleged that the offense was "'a serious felony within the meaning of . . . section 1192.7[, subdivision] (c).'"

Johnson underwent a jury trial in that case, after which the jury entered a verdict convicting him in count 2 of "assault with deadly weapon or by means likely to produce great bodily injury upon victim Alejandro Morales . . . ." (Some capitalization omitted.)

At Johnson's December 2002 sentencing hearing, Johnson admitted he had three prior prison convictions. When the court began to discuss his sentence, Johnson's counsel suggested within the following colloquy that section 654 applied:

"[Defense counsel]: Judge, I believe that in this case that 654 applies on the two allegations.

"[The court]: As to your client?

"[Defense counsel]: Yes.

"[The court]: How do you think that?

"[Defense counsel]: Because—

"[The court]: The evidence was that he was the one that used the tire iron on the victim.

"[Defense counsel]: Right.

"[The court]: Which could be a separate state of affairs.

"[Defense counsel]: Except on the facts of this case, the testimony that came out was that the tire iron was swung as he got out of the car. [¶] I think that there is obviously—the jury's verdict was such that they found that a tire iron was used. There was no great bodily injury, and the injuries that the victim described at trial were not consistent with actually physically being hit in the head. [¶] We would submit.

"[The court]: No, he testified it was on the back of the neck.

"[Defense counsel]: But still being clunked as if you were being swung at like a baseball bat in the back of the head with a metal tire iron, I think it's only logical to expect that there would be far more significant damage than we've heard here. [¶] I realize that there doesn't actually need to be injury for a defense, but I believe that the connection with the force is so intertwined with the facts of the robbery that they would merge under [section] 654 here."

The abstract of judgment in case No. TA065809 indicates that Johnson was convicted of "ASLT DEALY WEAPN/INST."

It is clear that the trial court in this case relied on the sentencing colloquy in deciding that Johnson's assault conviction qualified as a serious felony. Johnson again maintains that this record reflects only a "bare guilty verdict" to violating section 245, subdivision (a)(1), and that the record is silent as to the nature of his offense. Relying on *People v. Thoma, supra*, 150 Cal.App.4th 1096, he argues the comments of the court and counsel at his sentencing hearing constitute hearsay, they are not adoptive admissions, and the statements made subsequent to his conviction in case No. TA065809 are insufficient to establish the facts of his prior assault conviction. He does not dispute that the record of his prior conviction includes the sentencing hearing. (*People v. Thoma*, at p. 1101.)<sup>10</sup>

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<sup>10</sup> For the first time in his reply brief, Johnson further maintains that use of the court's comments at the sentencing hearing in case No. TA065809 to establish the serious felony nature of his prior conviction would violate his Sixth Amendment rights under

Curiously, Johnson does not discuss the notation in the abstract of judgment in case No. TA065809, and what inferences may be drawn from it, as the California Supreme Court did in *People v. Delgado*, *supra*, 43 Cal.4th 1059. In *Delgado*, the court conducted a bench trial on the defendant's prior offense allegations, including an allegation he had suffered a prior conviction for a violation of section 245, subdivision (a)(1). (*Id.* at p. 1064.) As evidence of the serious felony nature of the prior conviction, the People introduced certified records including a prison chronological history, an abstract of judgment reflecting his guilty plea to two felony counts, a fingerprint card and photograph, and an FBI form. (*Ibid.*) In a box on the abstract of judgment entitled "SECTION NUMBER" there was a notation of "245(A)(1)" and in a box entitled "CRIME" there was a notation of "Asslt w DWpn." (*Ibid.*) On appeal, the defendant argued the notation on the abstract of judgment was not sufficient to permit the inference that his conviction was for a serious felony. (*Id.* at p. 1065.)

Reviewing cases involving notations on abstracts of judgment, *Delgado* found no reason from them precluding a finding of a prior serious felony from evidence "contained solely in the abstract of judgment . . . ." (*People v. Delgado*, *supra*, 43 Cal.4th at p. 1069.) It explained that because the description of the crime in the abstract "tracks one, but only one, of the two specific, discrete, disjunctive and easily encapsulated forms

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*Descamps v. U.S.* (2013) 570 U.S. \_\_\_\_ [133 S.Ct. 2276]. Johnson forfeited this argument for failing to raise it in his opening brief. (*People v. Romero* (2015) 62 Cal.4th 1, 25; *People v. Tully* (2012) 54 Cal.4th 952, 1075 ["It is axiomatic that arguments made for the first time in a reply brief will not be entertained"]; *People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334, fn. 1; *People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2.)

of aggravated assault," any inference that the notation simply referred to the statute generally was "sharply diminished." (*Ibid.*) It held that absent rebuttal evidence, the People presented prima facie evidence in the form of a clear, presumptively reliable official record of defendant's prior conviction, that the conviction was for the serious felony of assault with a deadly weapon. (*Id.* at p. 1070.) That the abstract was not itself the judgment of conviction did not mean it was insufficient: "[T]he abstract is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence" and " 'the Legislature intended [it] to [accurately] summarize the judgment.' [Citation.] When prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, it is cloaked with a presumption of regularity and reliability." (*Ibid.*) In *Delgado*, as here, the defendant presented no evidence to rebut the presumption of accuracy and reliability. The court rejected an argument that the notation was simply the clerk's shorthand nickname for the offense in general: "Where . . . the abstract first identified the statute by section number, then separately and clearly described only one of the two means by which the statute can be violated, the court was not required to assume the descriptive language was mere surplusage." (*Id.* at p. 1071; see also *People v. Miles, supra*, 43 Cal.4th at pp. 1093-1094 [court relied on "bank robbery" notation on federal judgment form to conclude there was sufficient evidence to establish he had a prior qualifying conviction for sentence enhancement].)

Such is the case here. The abstract of judgment in this case contains a reference to section 245, subdivision (a)(1), describing the crime as "ASLT DEALY WEAPN/INST,"

which plainly refers to only assault with a deadly weapon or instrument, a serious felony. The abstract unambiguously identified the single type of assault for which Johnson was convicted and no evidence calls into question its " 'authenticity, accuracy, or sufficiency.' " (*People v. Delgado, supra*, 43 Cal.4th at p. 1066, quoting *People v. Epps* (2001) 25 Cal.4th 19, 27.) Our conclusion is not affected by other portions of Johnson's record that reflect both types of assaults. Abstracts of judgment should be specific and reflect the trial court's ongoing effort toward "scrupulous accuracy." (*Delgado*, at p. 1072.) As *Delgado* explained: "We stress that confusion in future cases can be avoided if judgment records are prepared with utmost care and sensitivity to their possible relevance in later criminal proceedings. When a defendant is convicted under a statute, such as section 245[, subdivision] (a)(1), that covers in the alternative two slightly different offenses, only one of which is defined as a serious felony, and the issue whether the conviction was for the serious or the nonserious form may thus have substantial penal consequences if the defendant suffers a subsequent felony conviction, it is necessary that the abstract of judgment specify, with scrupulous accuracy, the crime of which the defendant was actually charged and convicted." (*Delgado*, at p. 1072.) Thus, the lack of specificity in other references to the offense did not negate or rebut the appropriate and necessary specificity in the abstract of judgment, which we presume was intentional on the trial court's part. The trial court's strike finding is supported by substantial evidence.

### III. *Imposition of Two One-Year Enhancements for Prior Prison Terms*

Johnson contends the trial court erred by imposing two of his four one-year prison prior term enhancements (§ 667.5, subd. (b)) because they arose from the same assault

convictions in case Nos. TA040857 and TA065809, which were the basis of the court's imposition of the five-year serious felony enhancements (§ 667, subd. (a)(1)).<sup>11</sup> He asks this court to reduce his sentence by two years.

The People concede that under *People v. Jones* (1993) 5 Cal.4th 1142, a defendant cannot incur sentence enhancements under both sections 667 for a serious felony and 667.5 for a prison prior based on a single prior conviction. (*Id.* at p. 1150 ["[W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply"].) However, relying on *People v. Wiley* (1994) 25 Cal.App.4th 159, they assert the court did not err as to case No. TA65809, because Johnson was convicted of two different offenses in that case (assault with a deadly weapon and robbery) and the trial court properly based its true findings as to the serious felony prior allegation and prison prior allegation on the separate convictions. With respect to case No. TA040857, though

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<sup>11</sup> "Section 667.5, subdivision (b) provides for a one[-]year sentence enhancement 'for each prior separate prison term' served by the defendant. A 'prior separate prison term' is 'a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes . . . .'" (*People v. Grimes* (2016) 1 Cal.5th 698, 738, quoting § 667.5, subd. (g).) "[T]his statutory language means that only one enhancement is proper where concurrent sentences have been imposed in two or more prior felony cases." (*People v. Jones* (1998) 63 Cal.App.4th 744, 747.) In the amended information, the People alleged that Johnson had suffered four prior prison convictions. According to the allegations, Johnson's first prison prior was based on March 16, 1995 convictions for assault (§ 245, subd. (a)(1)) in case No. TA040857 and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) in case No. TA030801. Johnson's second prison prior was based on his August 17, 1998 conviction for grand theft in case No. TA051266. Johnson's third prison prior was based on his October 11, 1996 conviction for possession of a controlled substance in case No. TA045927. His fourth prison prior was based on the December 18, 2002 convictions for robbery and assault in case No. TA065809.

that case also involved two different offenses (assault with a deadly weapon and possession of a controlled substance in violation of Health and Safety Code section 11350), the People state a limited remand is appropriate because it is not clear whether the trial court made a true finding that the possession offense constituted an eligible prior prison conviction within the meaning of section 667.5, subdivision (b).

We agree *Jones* is factually distinguishable, as its analysis is based on a one-offense commitment being the basis for imposing sentence enhancements under both sections 667 and 667.5. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1055; *People v. Jones, supra*, 5 Cal.4th at pp. 1144-1145, 1153.) Here, at least in case No. TA065809, Johnson suffered multiple serious felony convictions that were not brought and tried separately, that is, the convictions were incurred in a single proceeding, for which he served a single prison term. "[A] single previous prison commitment for two or more serious felony offenses may serve as the basis for sentence enhancements pursuant to both section 667 and 667.5" as long as the court has not used "the same underlying facts to twice enhance the defendant's sentence." (*People v. Medina* (1988) 206 Cal.App.3d 986, 989-991; see also *People v. Wiley, supra*, 25 Cal.App.4th at pp. 162, 164 [following *Medina's* logic the trial court did not err by imposing both a one-year enhancement under section 667.5 for a prior prison term, served concurrently with that of a conviction for a different serious felony charged and tried in the same proceeding, for which the court imposed a separate five-year enhancement under section 667].) The robbery conviction would provide a sufficient basis in and of itself to support the prior prison term enhancement.

In case No. TA040857, however, as the People point out, the trial court remarked, "The [section] 11350 is kind of moot. That's now a misdemeanor, but it was the same incident as the [section] 245, same prison prior." The court then made a true finding on Johnson's first prison prior, "at least for the second count, the [section] 245[, subdivision] (a)(1), the second charge, [in case No. TA040857]." <sup>12</sup> We agree remand is appropriate for the trial court to clarify whether Johnson's March 16, 1995 conviction for possession of a controlled substance qualifies as a prison prior under section 667.5, subdivision (b) and is the basis for its finding.

#### IV. *Amendment of Abstract of Judgment*

The trial court found that Johnson had suffered two serious felony priors for purposes of the section 667, subdivision (a) five-year enhancement. The minute order for the sentencing hearing reflects two five-year enhancements were imposed on each of counts 1, 2, 3 and 5, but stayed on counts 2, 3 and 5. Johnson asserts that the abstract of judgment in this case incorrectly reflects eight serious felony prior convictions under section 667, subdivision (a)(1), two of which were imposed, and the rest stayed. Johnson argues that the abstract must be corrected to reflect the court's oral pronouncement that he had suffered only two, not eight, serious felony prior convictions. The People concede the point.

We decline to accept the People's concession. The abstract of judgment requires all *enhancements* to be listed. It reflects that the trial court imposed two five-year serious

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<sup>12</sup> There is no indication in the record that the trial court recalled Johnson's sentence on his March 1995 conviction for possession of a controlled substance.

felony enhancements on each of Johnson's indeterminate 25-year-to-life terms on counts 1, 2, 3 and 5, as it was required to do under *People v. Sasser* (2015) 61 Cal.4th 1, 12 and *People v. Williams* (2004) 34 Cal.4th 397, 400, 402, though it then stayed under section 654 the sentences and enhancements on counts 2, 3 and 5. There is no need to modify the abstract of judgment.

#### DISPOSITION

The true finding on Johnson's first prior prison conviction is reversed and the matter is remanded with directions that the court clarify whether Johnson's March 16, 1995 conviction for possession of a controlled substance qualifies as a prison prior under section 667.5, subdivision (b) and state the basis for its finding. In all other respects, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.